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SUPREME COURT, U.S.

No. 486

In the Supreme Court of the United States

October Term, 1954

Jesse W. Nolte, Petitioner-Appellant,

v.

Detroit Bridge & Iron Company, Contractor, Defendant-Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

REPLY TO BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 439

JOHN W. TOCCO, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1 (c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

STATEMENT

This is a direct appeal from the final judgment, entered July 14, 1954, of a three-judge district court convened pursuant to 28 U. S. C. 2284, 2325. The judgment dismissed a complaint which sought to set aside an order of the Interstate Commerce

Commission. The Commission order, entered July 18, 1947, denied appellant motor carrier a certificate of public convenience and necessity under the grandfather provisions of Section 206 (a) of the Interstate Commerce Act.

The underlying facts are not in dispute.[1] Appellant began operations as a common carrier by motor vehicle in 1928, and obtained operating authority from the States of Washington and Oregon in 1934. Early in 1935, following an accident involving one of his vehicles, his insurance was cancelled because of a law suit against him which arose out of the accident. Appellant was unable to obtain insurance from other companies, and as a result the two states cancelled his operating authority. Appellant then caused one of his employees to obtain insurance in his own (the employee's) name, together with operating authority from Washington and Oregon; appellant's business was being conducted in this way of June 1, 1935, the critical date for grandfather applications. Subsequently, the insurance company, upon discovering that appellant, and not the employee, was conducting the business, cancelled the insurance, and the states then cancelled the employee's operating permits. Appellant then began operating as a private carrier.

[1] The facts are set forth in *Tocco Common Carrier Application*, 24 M. C. C. 41, and in the excerpt from the report of Division 5 of the Commission, dated June 19, 1943, printed in the Appendix hereto, pp. 10–12.

Another of appellant's employees, one Beck, then obtained insurance in his own (Beck's) name and, in January, 1936, received state operating authority, and appellant's interstate business was resumed. In March, 1936, however, the insurance company discovered appellant's interest in the business and cancelled the insurance issued to Beck, and appellant resumed private carriage. In September, 1936, after a favorable decision in the law suit resulting from the accident, appellant obtained insurance in his own name, and resumed his common-carrier operation.

Meanwhile, on February 12, 1936, the last day for filing grandfather applications,[2] Beck filed a grandfather application claiming bona fide operation in his own name and right on the statutory date. In April 1936, after the insurance and operating permits issued to Beck had been cancelled, appellant filed in his own name a grandfather application, which sought the same rights sought by Beck. Appellant subsequently was substituted for Beck as the applicant in Beck's grandfather-clause application.

After a consolidated hearing on both applications before a joint board, the Commission in 1940 denied the grandfather applications. *Tocco Common Carrier Application,* 24 M. C. C. 41. It held that appellant acquired no grandfather

[2] Section 206 (a) requires all grandfather applications to be filed within 120 days after its effective date, or such later date as the Commission provides. The Commission duly extended the deadline to February 12, 1936.

rights through Beck, since the latter had ceased operations in the spring of 1936, and that appellant's own grandfather application, which had been filed approximately two months after the February 12, 1936, deadline for grandfather applications, was not timely. However, the Commission treated the latter application as one for a certificate of public convenience and necessity under Section 207 of the Act, and granted appellant certain operating rights.

The Commission, however, by order of March 18, 1941, vacated appellant's certificate and reopened the proceedings. Further hearings were held before the joint board, and in 1943 the Commission re-affirmed its prior decision insofar as it denied appellant grandfather authority. *Tocco Common Carrier Application,* 42 M. C. C. 870. The Commission again explained that, as successor to Beck, "applicant obviously cannot be granted authority except on a showing that the former had a bona fide operation of his own on and continuously after the statutory date to the time of applicant's succession."[2] Finding that Beck did not have such an operation, it held that applicant could take nothing as successor. The Commission further reiterated that it could not grant appellant any grandfather authority under his own application because "it was not season-

[2] The pertinent portion of the Commission's report of June 19, 1943, which has not been printed, is set forth in the appendix, pp. 10–12.

ably filed." However, the Commission again treated this latter application as one for a new certificate of authority, and granted appellant operating rights upon a finding that he had made an adequate showing of public convenience and necessity.

On suit to set aside the order brought by certain of appellant's competitors, the latter grant was set aside as not supported by adequate findings as to public convenience and necessity, and the matter was remanded to the Commission for further proceedings. *Inland Motor Freight* v. *United States,* 60 F. Supp. 520 (E. D. Wash.). At the subsequent hearings before the Commission, held in 1945, appellant presented no new evidence in support of his claim of grandfather rights, but in his brief he renewed his claim to such rights.

On July 18, 1947, the Commission issued the order here under review, in which it affirmed its previous findings and again denied appellant grandfather authority. The Commission stated[4] that in 1943 it had denied such authority to appellant "as successor to Beck" because of the "absence of a showing that Beck had a bona fide operation of his own on, and continuously after, the statutory date to the time of applicant's succession"; that no new evidence had been intro-

[4] The pertinent portion of the Commission's report of July 18, 1947, which has not been printed, is set forth in the appendix, pp. 12–13.

duced on the grandfather issue; and that accordingly it reaffirmed its prior findings with respect thereto. A petition for rehearing was denied in December, 1947.

More than four years later, in May, 1952, appellant filed this suit in the district court to set aside the order denying his grandfather application. After briefs and argument, the court unanimously affirmed the order. The court entered findings of fact and conclusions of law (Juris. St. 17–20) and concluded that the Commission's order was "supported by adequate findings based upon substantial evidence in the record as a whole and was not arbitrary, capricious, nor in excess of its statutory power" (*id.* 19).

ARGUMENT

Appellant states that this case presents the question whether interruption of operation resulting from cancellation of insurance following an accident for which appellant was not at fault constitutes an interruption within the control of the carrier-applicant within the meaning of the grandfather clause (Juris. St. 3), and his principal contention is that the Commission erred in deciding that it constitutes such an interruption. The fact is, however, that this question does not arise in this case.

Appellant's application filed in his own name in April, 1936, was dismissed, not because of interruption in service, but because it was not timely inasmuch as it was filed almost two months after

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the February 12, 1936, statutory deadline for filing grandfather applications. 24 M. C. C. 41–42.

Beck's application, which was filed on February 12, 1936, was timely, but Beck did not qualify for a grandfather certificate. Under Section 206 (a) of the Act, a grandfather applicant is entitled to a certificate upon a showing that he was "in bona fide operation * * * on June 1, 1935" and "has so operated since that time" except "as to interruptions of service over which the applicant or its predecessor in interest had no control * * *." Beck was not in operation on June 1, 1935. At that time appellant's business was being conducted in the name of one of his other employees. It was not until January 1, 1936, after the insurance issued to the other employee had been cancelled, that Beck began the operations for which he sought grandfather authority. Plainly, Beck was not operating on June 1, 1935, the critical grandfather date; indeed he conducted no operations until January, 1936. Thus the Commission was patently correct in holding that Beck's application failed owing to the absence of a showing that Beck had an operation of his own on and continuously after the statutory date.

Quite apart from this requirement, the Act requires a showing of "bona fide operation" which "suggests absence of evasion" (*McDonald* v. *Thompson,* 305 U. S. 263, 266). Beck's operation under his own name but as a cover for appel-

lant, whether or not in violation of state law, hardly meets that standard.[5]

The decision of the Commission, unanimously affirmed by the court below, is not based on "technical and legalistic distinctions" as asserted by appellant (Juris. St. 14), but follows from the plain requirements of the statute. "As the Motor Carrier Act is remedial, and the grandfather clause confers a special privilege, the proviso defining exemptions is to be held to extend only to carriers plainly within its terms." *Gregg Cartage & Storage Co.* v. *United States*, 316 U. S. 74, 83.

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[5] The Commission also pointed out in its 1940 opinion (24 M. C. C. 41) that Beck's operation failed to qualify because Beck had ceased operations in March 1936. Review of this separate ground for denial of grandfather rights, which is stressed by appellant, is not required inasmuch as the grounds discussed in the text fully support the Commission's decision. However, we think that this is an additional ground supporting the Commission's action. Beck's operations ceased when his insurance was cancelled. But Beck's insurance was cancelled, not because of any accident for which he was not at fault, as suggested by appellant (Juris. St. 3), but because he was found by the insurance company not to be the party in interest whereas he had obtained the insurance on the representation that he was. Under these circumstances we think it clear that the Commission was correct in refusing to disregard this interruption in service as one over which Beck "had no control." *Gregg Cartage & Storage Co.* v. *United States*, 316 U. S. 74.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct, and that this appeal presents no substantial question. The judgment of the district court should accordingly be affirmed.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

EDWARD M. REIDY,
General Counsel,
Interstate Commerce Commission.

DECEMBER 1954.

APPENDIX

Excerpt from the report of Division 5 of the Interstate Commerce Commission in *Tocco Common Carrier Application,* June 19, 1943:

* * * * *

Applicant began operating in 1928 as a common carrier by motor vehicle of property. On October 5, 1934, he received a permit from the Washington Department of Public Service authorizing the transportation of specified commodities. On December 5, 1934, he was also authorized by the Public Utilities Commissioner of Oregon to operate as a common carrier, anywhere for hire, in interstate commerce only. Some time late in 1934 one of his vehicles, while properly parked on the side of a road undergoing repairs, was involved in a serious accident with another car, as as result of which suit was filed against applicant in Idaho. Early in 1935 his insurance policies were canceled because of the pending law suit. Efforts were made to obtain insurance from various other insurance companies, but in this applicant was unsuccessful. Since the Washington and Oregon Commissions required carriers to maintain insurance, applicant's failure in this respect resulted in recision by those States of his operating authorities. Thereafter, he caused two of his employees to obtain insurance in their names, together with appropriate authorities from the two States in question. Applicant paid the premiums on the insurance, however, as well

as the cost of operation. The employees received only their wages. The operation was being conducted in this manner on June 1, 1935. Subsequently, the insurance company, discovering the operation to be applicant's canceled the insurance, which once more resulted in recision of the State authorities. Applicant then began operating as a private carrier, and turned his interstate traffic over to other for-hire carriers for transportation. Later he entered into negotiations with Ernest Albert Beck, in whose name insurance was obtained; and also appropriate Washington and Oregon operating authorities on January 3, 1936 and January 4, 1936, respectively, and interstate operation was resumed. On February 12, 1936, Beck filed in his own name the "grandfather" clause application, No. MC–18209, claiming bona fide operation in his own name and right on the statutory date. Beck, however, clearly was never any more than an employee of applicant. The operation was conducted in Beck's name until March 24, 1936, when the insurance company discovered applicant's interest and again canceled the insurance. Operation as a private carrier was then resumed. In April 1936 applicant filed the application, No. MC–92633, claiming the right to a certificate by reason of his operation in the name of others on and after the statutory date. In September 1936, which was apparently after a conclusion favorable to himself and his insurer of the law suit arising out of the above-mentioned accident, applicant obtained insurance in his own name, resumed operation, and has operated continuously since that time. As indicated, he was substituted for

Beck as applicant in No. MC–18209 and succeeded to whatever rights Beck had. Applicant is now, therefore, the sole party in interest in both proceedings.

As successor to Beck, applicant obviously cannot be granted authority except on a showing that the former had a bona fide operation of his own on and continuously after the statutory date to the time of applicant's succession. That he did not, and that applicant can take nothing as successor is clear from the facts already stated. Application No. MC–18209 will accordingly be denied.

Excerpt from the report of Division 5 of the Interstate Commerce Commission in *Tocco Common Carrier Application*, July 18, 1947:

* * * * *

At the 1945 hearing applicant presented no further evidence in support of the claim of "grandfather" rights but, in his subsequently filed brief, he renews his claim to such rights. In the second report his claim, as successor to Beck, was denied in the absence of a showing that Beck had a bona fide operation of his own on, and continuously after, the statutory date to the time of applicant's succession. In view of the statement in the second report that Beck "was never any more than an employee of applicant", the contention is now made that we must, in order to be consistent, find that the operations were in fact those of applicant; that his succession to Beck was unnecessary; and that, under the law, applicant is entitled to a certificate authorizing the operations under the "grandfather" provisions of the act.

This contention would have us consider this application as one by Tocco instead of one by Beck. It would also have us overlook the manner in which the operations were actually conducted from the first part of 1935 to September 1936, that is, by applicant's former drivers as for-hire carriers and by applicant himself as a private carrier. The history of the operations during this critical period is set forth in the second report and the facts stated therein are not disputed by applicant. In the absence of any new evidence on the subject, we believe that our prior findings in respect thereof should be affirmed. Accordingly, the application, No. MC–18209, will be denied.

* * * * *

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